

IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:)	
)	
BRIAN A. McKINSEY)	Supreme Court # SC87056
)	
RESPONDENT.)	

BRIEF OF RESPONDENT

LAW OFFICE OF JOHN J. ALLAN, P.C.

John J. Allan, #24080
4931 Lindell Blvd., Suite 1 E
St. Louis, MO 63108
(314) 361-7100
(314) 361-8440 (Fax)

ATTORNEY FOR RESPONDENT

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TABLE OF AUTHORITIES

CASES

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In re Donaho, 98 S. W. 3d 871 (Mo. banc 2003)

In re Forge, 747 S. W. 2d 141 (Mo. banc 1988)

In re Shelhorse IV, 147 S. W. 3d 79 (Mo. banc 2004)

In re Snyder, 35 S. W. 3d 380 (Mo. banc 2000)

In re Stricker, 808 S. W. 2d 35 (Mo. banc 1991)

In re Waldron, 790 S. W. 2d 456 (Mo. banc 1990)

In re Wiles, 107 S. W. 3d 223 (Mo. banc 2003)

OTHER AUTHORITIES

ABA Standards for Imposing Lawyer Sanctions, (1991 ed.)

RULES

Rule 16

Rule 16.08

STATEMENT OF JURISDICTION

Respondent adopts and accepts Informant's Statement of Jurisdiction.

SUPPLEMENTAL STATEMENT OF FACTS

Respondent respectfully supplements Informant's Statement of Facts as follows:

On December 23, 1999, during his representation of Mr. Shoemaker, Respondent's wife left him. Six weeks later, on February 6, 2000, Respondent's only son received a massive traumatic brain injury as a result of a motor vehicle accident. On February 14, 2000, Respondent was required to terminate his son's life support systems.

The above events greatly aggravated Respondent's disease of alcoholism. During the time frame involving Ms. Whitely, Respondent's home was set for foreclosure sale on July 15, 2003, as a result of a judgment in the Circuit Court of St. Louis County obtained by Southwestern Bell, as well as the IRS lien and a dissolution of marriage judgment.

Respondent has been treated on three (3) occasions for alcoholism: (a) January 19, 2001 at Edgewood in St. Louis, Missouri; (b) April 2002 in Farmington, Missouri; and (c) July of 2004 at Booneville Valley Hope in Booneville, Missouri. Since leaving the in-patient program at Booneville Valley Hope on August 20, 2004, Respondent has continued treatment in after-care, maintained regular attendance at meetings of Alcoholics Anonymous and maintained sobriety for a period in excess of fifteen (15) continuous months.

In addition, in the Stipulation as to other factors for consideration produced to the Hearing Panel, it was agreed:

1. “Respondent displayed candor and cooperation to the Informant during the disciplinary investigation of this matter. At the request of the Office of the Chief Disciplinary Counsel, Respondent submitted himself for an evaluation by the Professional Renewal Center in Lawrence, Kansas, to assist in the resolution of this matter. Respondent has agreed to accept and follow the recommendations suggested by the Professional Renewal Center during any probationary period ordered in conjunction with the disciplinary proceedings in this matter. [Standard 9.32 (e), ABA Standards for Imposing Lawyer Sanctions.]

2. At the time of the stipulated facts of misconduct, Respondent was suffering from emotional difficulties and substance abuse problems which expert testimony would establish were responsible for the misconduct. As indicated above, Respondent submitted himself for an evaluation by the Professional Renewal Center, Lawrence, Kansas, in conjunction with this matter. A copy of their report is attached hereto and marked as Exhibit 1. The difficulties experienced by Respondent were not the product of any illegal conduct, Respondent has taken steps to overcome said difficulties and has agreed to certain conditions of probation recommended by the Professional Renewal Center in conjunction with this matter which will address said issues throughout the period of probation and

thereby reduce the risk of future harm to the public. [ABA Standard 9.32(h) and 9.32(j), ABA Standards for Imposing Lawyer Sanctions.]

3. Respondent has fully acknowledged his wrongdoing and acknowledged that by his conduct, he placed client funds at risk. [ABA Standard 9.32(l), ABA Standards for Imposing Lawyer Sanctions.]”

The OCDC referred Respondent to the Professional Renewal Center on March 22, 2004. On April 6, 2004, Scott C. Stacy, Psy.D., provided his report. The report notes the following:

1. “The assessment team is of the opinion that there was a nexus between Mr. McKinsey’s life stressors, relationship losses, abuse of alcohol and resulting compromised judgment and professional misconduct.”

2. “There appears to be a connection between his chronic abuse of alcohol and resulting poor judgment and violating the sanctity of his client trust fund.”

3. “It is likely that his excessive use of alcohol also contributed to his poor judgment.” (A-13)

4. “With proper assistance and support, the assessment team is of the opinion that Mr. McKinsey has good rehabilitation potential.” (A-14)

The report concludes, “To a reasonable degree of psychological certainty, the assessment team is of the opinion that Dr. (sic) McKinsey is not presently suffering

from a psychiatric or cognitive disorder that would prevent him from practicing law with skill and safety, as long as he adheres to the recommendations outlined below.” (A – 14)

Subsequently, and prior to the April 2005 hearing, the panel was also provided with a Counselor Discharge Summary from Valley Hope Association in Boonville, Missouri. The final diagnosis was “alcohol dependence.” (A-19) The prognosis for recovery was stated to be “good if he maintains his aftercare plans of attending AA, aftercare counseling at St. Louis Valley Hope, and obtaining and working with a sponsor of the 12-step program.” (A - 19) Subsequently, it was confirmed that Respondent has, in fact, regularly attended aftercare counseling, works closely with his AA sponsor and attends step meetings regularly. (A – 17, A - 20)

In reference to Mr. Shoemaker, it has also been agreed that a full refund of the costs advanced as well as the file was made. With regard to Ms. Whitely, full financial restitution has also been made.

POINTS RELIED ON

I.

VIOLATIONS

- A. THERE WAS A DIRECT AND PROXIMATE RELATIONSHIP BETWEEN RESPONDENT'S DISEASE OF ALCOHOLISM AND SEVERE EMOTIONAL DISORDERS AND THE RULE VIOLATIONS COMPLAINED OF HEREIN.

In re Snyder, 35 S.W. 3d 380 (Mo. banc 2000)

In re Shelhorse, 147 S.W. 3d 79 (Mo. banc 2004)

In re Wiles, 107 S.W. 3d 228 (Mo. banc 2005)

In re Crews, 159 S.W. 3d 355 (Mo. banc 2005)

Rule 16

ABA Standards for Imposing Lawyer Sanctions

II.

SANCTIONS

- B. THE INTEREST OF PROTECTING THE PUBLIC AND THE
LEGAL PROFESSION MAY BE PROPERLY SERVED BY
SUSPENSION WITH PROBATION OF RESPONDENT IN LIEU
OF COMPLETE DISBARMENT.

In re Stricker, 808 S.W. 2d 356 (Mo. banc 1991)

In re Donaho, 98 s.w. 3D 871 (Mo. banc 2003)

In re Shelhorse, 147 S.W. 3d 79 (Mo. banc 2004)

Rule 16

Rule 5.225

ARGUMENT

I. VIOLATIONS

SUSPENSION OR PROBATION IS APPROPRIATE IN THIS CASE
BECAUSE:

- A. RESPONDENT’S SEVERE EMOTIONAL PROBLEMS AND
DISEASE OF ALCOHOLISM WERE DIRECTLY AND
PROXIMATELY RELATED TO THE MISCONDUCT AND
VIOLATIONS AND CONSTITUTE MITIGATING
FACTORS.

In reviewing cases involving attorney discipline, this Court has held:
“The disciplinary panel’s findings of fact, conclusions of law, and
recommendations are advisory. *In re Snyder*, 35 S.W.3d 380, 382 (Mo.banc
2000). This Court reviews the evidence de novo, independently determining
all issues pertaining to credibility of witnesses and the weight of the
evidence and draws its own conclusions of law. *Id.* Professional
misconduct must be proven by a preponderance of the evidence before
discipline will be imposed. *Id.* *In re: John C. Shelhorse, IV*, 147 S.W. 3d
79 (Mo. banc 2004). This Court has also held that “When determining an
appropriate penalty, the Court considers the gravity of Respondent’s

misconduct as well as any mitigating or aggravating factors that tend to shed light on Respondent's moral and intellectual fitness as an attorney.” *In re: Stanley L. Wiles*, 107 S.W.3d 228 (Mo. banc 2003).

This Court has frequently referred to the American Bar Association's Standards for Imposing Lawyer Sanctions (1991) (ABA Standards).

Recently in the case of *In re: James F. Crews*, 159 S.W.3d 355 (Mo. banc 2005), this Court noted that: “Suspension, on the other hand, is recommended when a lawyer (a) knowingly fails to perform legal services, (b) knowingly engages in practice that he or she is not competent to handle, (c) deceives a client, (d) engages in a pattern of neglect, or (e) violated a duty to the profession; the result of which causes injury or potential injury to a client, the public or the legal system.” *Id.*

II.

SANCTIONS

- A. RULE 16 OF THE MISSOURI RULES OF CIVIL PROCEDURE REGARDING INTERVENTION SHOULD BE UTILIZED TO REHABILITATE RESPONDENT.
- B. THAT THE MITIGATION FACTORS OF THE ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS

PROVIDE A BASIS FOR ALTERNATIVE DISCIPLINE IN
LIEU OF DISBARMENT.

Rule 16 of the Missouri Rules of Civil Procedure provides for substance abuse intervention. In Rule 16.01, it is noted that the Rule's purpose is to "recognize the interrelationship of substance abuse and the disciplinary process."

Rule 16.08 (b) states:

(b) This Court, as a mitigating factor in the disciplinary process, may order that a substance abuser be placed on probation if it is demonstrated that the substance abuser has undertaken a rehabilitation program, and:

- (1) If a lawyer, can perform legal services and the lawyer's continued practice of law will not cause the courts or profession to fall into disrepute;
- (2) If a judge, can perform the duties and requirements of office and continued service in the judicial function will not cause the courts or profession to fall into disrepute;

(3) It is unlikely to harm the public during the period of rehabilitation and the necessary conditions of probation can be adequately supervised;

(4) Has a disability that is temporary or minor and does not require treatment and transfer to inactive status.

(c) Probation may be ordered for a specified period of time or until further order of this Court in conjunction with a suspension, which may be stayed in whole or in part.

(d) The order establishing probation shall state the conditions of probation, which shall take into consideration the nature and circumstances of the misconduct and the history, character, and condition of the substance abuser. The following conditions, and such others as this Court deems appropriate, may be imposed:

(1) Periodic reports to the committee;

(2) Satisfactory completion of a course of treatment or study;

(3) Restitution;

- (4) Limitations on practice;
- (5) Counseling and treatment;
- (6) Abstinence from all mood-altering drugs;
- (7) Random drug screening;
- (8) The payment of disciplinary costs.

As noted above, the OCDC referred Respondent to the Professional Renewal Center on March 22, 2004. On April 6, 2004, Scott C. Stacy, Psy. D., provided his report. The report notes the following:

1. “The assessment team is of the opinion that there was a nexus between Mr. McKinsey’s life stressors, relationship losses, abuse of alcohol and resulting compromised judgment and professional misconduct.”
2. “There appears to be a connection between his chronic abuse of alcohol and resulting poor judgment and violating the sanctity of his client trust fund.”
3. “It is likely that his excessive use of alcohol also contributed to his poor judgment.” (A – 13)
4. “With proper assistance and support, the assessment team is of the opinion that Mr. McKinsey has good rehabilitation potential.” (A – 14)

The report concludes, “To a reasonable degree of psychological certainty, the assessment team is of the opinion that Dr. (sic) McKinsey is not presently suffering from a psychiatric or cognitive disorder that would prevent him from practicing law with skill and safety, as long as he adheres to the recommendations outlined below.” (A - 14)

Subsequently, and prior to the April 2005 hearing, the panel was also provided with a Counselor Discharge Summary from Valley Hope Association in Boonville, Missouri. The final diagnosis was “alcohol dependence.” (A – 19) The prognosis for recovery was stated to be “good if he maintains his aftercare plans of attending AA, aftercare counseling at St. Louis Valley Hope, and obtaining and working with a sponsor of the 12-step program.” (A - 19) Subsequently, it was confirmed that Respondent has, in fact, regularly attended aftercare counseling, works closely with his AA sponsor and attends step meetings regularly. (A -17, A - 20)

It is respectfully submitted that the above establish:

- (a) the substance abuser (Respondent) has undertaken a rehabilitation program;
- (b) the substance abuser (Respondent) can perform legal services and the lawyer’s (Respondent’s) continued practice of law will not cause the courts or the profession to fall into disrepute;

- (c) Respondent is unlikely to harm the public during the period of rehabilitation and the necessary conditions of probation can be adequately supervised;
- (d) Respondent's disability is being actively dealt with and monitored and does not require transfer to inactive status.

In a case involving a recovering alcoholic, *In re Timothy L. Donaho, Jr.*, 98 S.W.3d 871 (Mo. banc 2003), this Court noted:

“However, where mitigating factors otherwise demonstrated the attorney's fitness to practice law, we have also imposed suspensions even though the case involved intentional deceit. See, e.g., *In re Stricker*, 808 S.W. 2d 356, 361 (Mo. banc. 1991); *In re Waldron*, 790 S.W.2d 456, 461-462 (Mo. banc 1990); *Forge* [747 S.W.2d 141 (Mo. banc 1988] at 145-146.”

Further, in the concurring and dissenting opinion of Senior Judge Blackmar in *In re: John C. Shelhorse, IV*, 147 S.W.3d 79 (Mo. banc 2004), it was noted that “Interruption of his practice at this stage would harm not only the respondent and his family, but also his clients and the courts.”

Respondent would respectfully suggest the following discipline: Respondent's license would be suspended indefinitely, with leave to apply for reinstatement after one year. Respondent's suspension be stayed and that

Respondent be placed on probation pursuant to Rule 5.225 for a period of three (3) years.

The terms of probation suggested are as follows:

1. The Chief Disciplinary Counsel or such attorney as they may direct shall be the probation monitor. Respondent shall submit quarterly written reports to the Chief Disciplinary Counsel concerning the status of his practice of law and nature and extent of his compliance with conditions of probation. The reports shall be due March 31, June 30, September 30, and December 31 of each year during the period of probation. Each quarterly report shall list:
 - a) any address changes;
 - b) all continuing legal education classes attended;
 - c) any arrests of Respondent;
 - d) any criminal charges brought against Respondent;
 - e) any criminal conviction of Respondent;
 - f) any civil lawsuit filed against Respondent;
 - g) any civil judgment entered against Respondent;

- h) the bank location and account numbers of all Respondent client trust accounts; and
 - i) a general description of Respondent's law practice, including any disputes with clients;
 - j) the number of meetings of Alcoholic's Anonymous attended by Respondent per week which shall be no less than four (4) meetings per week;
 - k) continued participation in and attendance of the aftercare program being administered by Boonville Valley Hope in St. Louis, Missouri, at least one (1) session per week;
- 2. Respondent shall notify the Chief Disciplinary Counsel within fourteen days of any change of address;
- 3. respondent shall submit to independent audits of his trust account, conducted by an auditor approved by the Chief Disciplinary Counsel, at Respondent's expense. The audits may be conducted at random times during the period of probation. The timing of any audit shall be determined by the Chief Disciplinary Counsel.

4. The Respondent shall notify the Chief Disciplinary Counsel within fourteen days of any changes in the bank location or account number of Respondent's trust account.
5. Respondent shall attend at least two of the following continuing education programs and obtain a minimum of 12 CLE credits from program attendance:
 - a. Missouri Bar – Annual Law Update;
 - b. Missouri Bar – Solo and Small Firm Conference;
 - c. Missouri Bar – Dealing with ethical issues in your practice;
 - d. Missouri Bar – How to be professional, ethical and avoid malpractice;
 - e. Missouri Bar – Essentials of Missouri Practice;
 - f. Missouri Bar – Ethics in Litigation;
 - g. Any other MCLE approved course approved in advance by the Chief Disciplinary Counsel.
6. The required attendance in paragraph 5 shall be in addition to the MCLE requirements of Rule 15.05. The 15.05 requirements for the then current reporting year shall be completed prior to the termination of probation.
7. No further violations of the Rules of Professional Conduct.

CONCLUSION

The medical evaluation performed at the request of Informant established a direct and proximate causal relationship between Respondent's disease of alcoholism and severe emotional disorders and the rule violations complained of herein. The Respondent has acknowledged these violations, cooperated with the investigation, been truthful with the Panel and demonstrated remorse according to the Panel. Respondent has addressed his mental health issues in conformance with the suggestions of the aforementioned evaluation. The interests of the public and the legal profession may be served by Respondent receiving a discipline less severe than that of complete disbarment, and facilitate Respondent's recovery process. It is respectfully submitted that suspension with probation may accomplish the ends of protecting the public and allow Respondent to pursue recovery, rehabilitation and his profession.

Respectfully submitted,

LAW OFFICE OF JOHN J. ALLAN, P.C.

By:

John J. Allan #24080
4931 Lindell Blvd., Suite 1 East
St. Louis, Missouri 63108
314-361-7100
314-361-8400 (Fax)

ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

The undersigned counsel for Respondent hereby certifies that he served two copies and one diskette of the Brief of Respondent upon the Commissioner of the OCDC Panel on this 9th day of November, 2005 to the address below:

Office of Chief Disciplinary Counsel
Mr. Sam S. Phillips
Deputy Chief Disciplinary Counsel
3335 American Avenue
Jefferson City, MO 65109

John J. Allan
Attorney for Respondent

CERTIFICATION: RULE 84.06 (c)

The undersigned hereby certifies, that to the best of my knowledge, information and belief, that this brief:

1. Includes the information required by Rule 55.03;
2. Complies with the limitations contained in rule 84.06(b);
3. Contains 3055 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and
4. That the diskette was scanned for viruses and it is virus free.

John J. Allan
Attorney for Respondent